

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Broadband Industry Practices	)	WC Docket No. 07-52
Notice of Inquiry	)	
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**Comments of the Competitive Enterprise Institute**

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**Overview: The Choice Between Net Neutrality or “Bandwealth”**

The Federal Communications Commission Notice of Inquiry seeking input on “Broadband Industry Practices,” (primarily net neutrality) arises in an important context. Network neutrality activists—by the thousands—claim that not regulating network owners will leave the Internet at the mercy of a few large companies, when the activists’ backers are themselves large companies.

Grassroots activist hi-jinks aside, both sides in net neutrality debate risk increased vulnerability to political predation as a result of this proceeding, and make themselves more so the longer their respective upper-level managements fail to jointly call these proceedings into question in a CEO-level communications industry “summit” of sorts. It is self-destructive to believe that content companies and their customers ultimately benefit from a regime in which they cannot change course and pay for premium quality services well beyond the capabilities of today’s technologies. Letting lieutenants run this show on the Washington battlefield is disastrous policy for the content industry. The wealth, infrastructure, content, options, consumer benefits and security to be created in a non-neutral regime vastly exceed what “neutrality” can sustain on a regulated network.

Net neutrality mandates imply that private control by dominant vendors is against the public interest. But a better starting point is to appreciate that we have today is not broadband at all compared to future needs. Cable and DSL speeds are a trickle compared to the Niagara needed tomorrow, before even addressing the security and delivery requirements vastly beyond today’s capabilities and glossed over by the assertions of authority permeating the NOI. Freezing today’s Internet into a regulated public utility via net neutrality’s FCC-serving price-and-entry regulation would obviously slow investment and innovation—meaning fewer new companies, networking deals, products and technologies—but will ultimately hurt content companies too. Neutrality undermines wealth maximization, *including content maximization*. (It will also undermine spectrum maximization, important to note now that efforts are underway to *pre*-regulate wireless networks that do not even exist, rather than prioritize infrastructure/content industry summits to explore market institutions to develop fluid secondary markets in future spectrum.) A network in which government regulates infrastructure is one in which content regulation is easier as well.

Net neutrality advocates’ premise is that infrastructure companies should not control content, but that it’s perfectly acceptable for content companies, in conjunction with government, to control infrastructure. The implications of entrenching this idea further in law and policy at this stage of communications history are incandescent. This proceeding undermines the aggressive communications liberalization campaign actually in the interest of both sides, and in the consumer interest. Success in inflicting the “infrastructure socialism” embodied in net neutrality would set in place the machinery for endless interventions, not just against the current targets but against today’s advocates.

*We stand on the brink of regulating on the basis of what has not happened.* The temporary gain by securing regulatory control over the other side pales in comparison to the rewards of network, content and communications liberalization that should be the emphases of both sides. At stake is the destruction of infrastructure wealth, consumer welfare, and even infrastructure security—a crucial consideration largely exiled from a NOI that risks putting a scarlet “D” on the kind of “discrimination” that even security ultimately depends upon.

The agency and both sides in the debate must step back rather than act on the inevitable regulatory impulses that will emerge from this proceeding, impulses likely to entice congressional interest as well. The questions in the NOI, although addressed here, are the wrong ones to ask at this stage if one’s concern is flowering of infrastructure and content. The deliberate conflation of *competition* with government-defined openness and a sentiment toward forced access (and the attendant government role in price and entry regulation) colors the entire proceeding. What does FCC truly regard as the source of new infrastructure wealth? What *definable and limited political institutions* foster the necessarily hand-in-hand growth of content and network infrastructure?

An elemental flaw in the FCC’s proceeding is the misconception that the interests of infrastructure owners on the one hand, and content owners on the other (as well as consumers) *legitimately conflict in a world where the option of turning to regulators for unearned political favors is unavailable*. Rather, the two are natural partners, and the very existence of these proceedings helps create the conflict in which we find ourselves engaged. We stand at the brink of undermining “bandwealth.”

This brief, in the context of addressing FCC’s queries, takes the opportunity to explore what institutions are the *true sources of “openness” in civil society*. Choices are government or private sector; proprietary networks on which choices and contracts can be exercised and altered, or “neutral” ones controlled politically. Ensuring neutrality on a network that none of our descendants would want to use is an easy thing to do but hardly worthwhile. The federal agency claiming to protect networks can too easily herald their stagnation.

### **NOI Fosters Political Vulnerability for All Players**

There is no such thing as an unregulated industry. The choice is between *competitive* discipline and *political* discipline. It’s in the interest of all sides of this debate—truly a clash of the titans in the good sense of the term, given the bounty consumers stand to gain—to come to terms on an FCC *rollback*

that benefits all side, not a re-energized regulatory regime. It may seem cynical to joke that the net neutrality campaign is no more meritorious than would be a campaign against Google itself for “search neutrality” to ensure that all search results appear first; nonetheless there’s truth to it; Google faces similar market power and information-gatekeeper accusations, even as a content company. Net neutrality conflicts with the genuine needs of consumers and ultimately its advocates’ goals—but comports well with agency turf building.

Any regime that a successful net neutrality campaign establishes would make the entire communications sector more vulnerable to future political predation; CEOs of the companies involved would benefit from reassessing what corporate counsels and federal affairs shops are pursuing, and consider changing course. One consulting firm approvingly notes that the NOI “has the potential to broaden the scope of the debate substantially and to put some of the parties who have been pushing net neutrality on the defense.” While those seeking to fend off neutrality mandates might experience some glee at this notion, this is a trap. FCC, in response, will simply say, “You’re both right.” To the extent this proceeding results in questioning the conduct of content providers, it *further enlarges the scope of future regulatory purview*, thus this appeal for reconsideration. Another serious consideration in this campaign is what FCC and content companies regard as the impact of net neutrality mandates on First Amendment protections for infrastructure company business decisions; would mandates survive a challenge?<sup>1</sup> And if they would, do content companies really regard this as a positive development for *their* interests? It is remarkable that a NOI of this magnitude neglected this question.

As argued below, even in terms of “non-discrimination” and “openness,” net neutrality is a flawed idea. Discrimination is another word for *choice*; or prioritization of life-critical medical information; filtering; or protecting kids and so forth. Those who recognize “discriminatory” behavior as beneficial and essential to consumer service don’t occupy a stance from which to truly criticize a content provider as the consultant above noted. All network owners *and content providers* must “discriminate,” or “exclude” in a way that enables business expansion, network management or operations control or competitive content creation; that’s why they’re rendered vulnerable to predation by neutrality. Vulnerability also stems from the fact that the lines between access providers and content providers—between message and delivery of the message, can increasingly blur; well functioning capital markets mean content companies can themselves become infrastructure

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<sup>1</sup>Randolph May argues against the survival of such a challenge. “Net Neutrality Mandates: Neutering the First Amendment in the Digital Age,” *I/S: A Journal of Law and Policy*, Vol. 3:1, May 2007. [http://www.freestatefoundation.org/images/IS\\_Journal\\_Net\\_Neutrality.pdf](http://www.freestatefoundation.org/images/IS_Journal_Net_Neutrality.pdf)

companies. Balances of power will inevitably shift, much like cable firms paying for broadcast content rather than broadcasters having to beg.<sup>2</sup> Net neutrality's hard line between infrastructure and content is imaginary in fluid markets, imposing a false dichotomy between content and infrastructure. Sometimes industry reorganization reaches a tipping point that renders old fights moot—but with lots of avoidable pain in the interim.

To favor net neutrality regulation is to discriminate in favor of one side in a battle of equals, damaging services for everyone. Just as consumers may *want* lower electric power rates in exchange for interruptible services while industrial concerns may pay extra for premium power, one can readily envision future communications network deals in which content providers *want* to secure preferential treatment, or pay less for non-vital transmissions, all of which is perfectly consistent with the openness enjoyed online now. The end result of the myriad transactions will be *a constant escalation in the basic capabilities of the network*, an intensification in the “background hum” of the Internet as a whole, much as we’ve already witnessed without legislation’s having been imposed to interrupt the process.

Net neutrality is not a new concept, but is rooted in ideas of “natural” monopoly and a longing for common carriage. It glosses over the historical role of regulatory agencies in officially establishing those monopolies in the first place through such vehicles as exclusive franchises and regulatory “certificates of convenience and necessity.”

**Net neutrality rests upon numerous misperceptions about competitive markets and capitalism, including but not limited to the following:**

- Infrastructure companies and content companies are naturally at odds.
- Competition requires political force.
- Discrimination is bad, and such a thing as “non-discrimination” exists.
- Net neutrality is itself not a form of picking sides (or discrimination, as it were)
- Infrastructure companies should not control content; however, content companies, in conjunction with bureaucracies backed by legislation and regulation, should control infrastructure companies.
- Government enforced net neutrality spawns “openness”; market impulses do not.
- Communications flows (video, information, calls etc.) are maximized by neglecting, even blocking, the liberalization of and enforcement of property rights in grids.

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<sup>2</sup> Peter Grant and Brooks Barnes, "Television's Power Shift: Cable Pays for 'Free' Shows," Wall Street Journal, February 5, 2007, p. A1.

- Networks themselves cannot be regarded as a competitive unit in any sense: only the movement of bits from point A to point B on an existing network counts as competition. Networks best exist as passive husks, not dynamic forms of infrastructure wealth created, managed and duplicated in response to price signals.
- “Market failures” matter, government failures do not exist (indeed, they are not mentioned in the Notice of Inquiry).
- Infrastructure companies’ interest lies in not selling services, in not exploiting gains from trade with content companies whatever petty transitory jealousies may exist.
- Wall Street, rivals and consumers cannot react to discipline inefficient network management or generate new bandwidth infrastructure, but will remain passive.
- FCC is better equipped than capital markets and a global economy to discipline ill-managed networks.
- Alternative, profit-driven modes of infrastructure organization matter less than FCC regulating the mode that exists: User ownership of grids; liberalization of non-telecom network industries to enable wide-scale, cross-industry infrastructure consortia; “splintering” into and out of the public net by private carriers, all have little role to play and may safely be ignored.
- Moreover, FCC interference will not undermine these alternative modes of discipline, or alter technological trajectories in any harmful way.

### **The Contemporary Policy Environment Surrounding the NOI**

Net neutrality, like many Internet and tech policy issues, does not necessarily track party lines, although it happens to among FCC commissions to an extent. But no commissioner rejects the principles of neutrality in a fundamental sense. Even if there existed numerous instances of blockage by access providers, the issue should center less over the merits of infrastructure socialism, and more over the relevance and capabilities of the FCC in advancing infrastructure, or “bandwealth.”

Despite the copious materials that will be prepared for this proceeding, Democratic commissioners exhibit plain preferences for rules and see the time for rulemaking as past. They complain that we’re commenting upon a Notice of Inquiry rather than a Notice of Proposed Rulemaking.

The net neutrality impulse is not unique, having been implemented or advocated in power grids, operating systems, various interoperability mandates, search results, instant messaging and more. The rationale is dubious even pertaining to communications networks, since, as numerous online photos illustrative of the early communications era illustrate, massive

redundancy and duplication of wires existed even in the early telecommunications and electricity era. The capital and incentives available to build are even higher today. No natural monopoly problem ever existed, whatever aesthetic predicaments may have plagued the dawn of communications and electricity. A failure to define property rights and rights of way to avoid unsightly congestion is not a market failure; indeed, is concrete disproof of natural monopoly. We thus have a quandary with respect to the bureaucracy that remains today. Industry itself sought regulation in exchange for the outlawing of competition, the legacy with which we now deal. Conventional antitrust could of course address any residual monopoly power without invoking net neutrality. Even there, antitrust has major flaws of its own that can be worse than the alleged monopolization; and even where invoked, mandated access would need to be on a rifle-shot basis rather than imposed as the defining feature of a network.

Commissioner Copps, who pressed for the Internet Policy Statement upon which the NOI was based, said, “I know what I want. I want an FCC that unconditionally states its preference for non-discrimination on the Internet”; a statement made, ironically, even as preparations mount to collude with content creators to entrench a discriminatory system from which no exit strategy is apparent when the “need” for regulation subsides. Another commissioner echoed this sentiment: “This Commission must not send a signal that preserving the open character of the Internet is anything less than a top priority,” and elaborated that “[T]he time is right for an NPRM.”

Commissioner Adelstein suggests that as a vehicle, the NOI may send “a message about how low it ranks on the Commission’s list of priorities.” I would suggest instead that this NOI appears in an environment lacking crucial intellectual and moral groundwork for an increasingly urgent telecommunications liberalization. Republican commissioners fail to take moral certitude from regulation’s imperfect past and shine a light outward, instead meekly noting the need to guard against “market failure.”

The trap of these proceedings is that there’s no way to prove “non-discrimination,” because price and service differentiation have always been critical to well functioning network services and will become even more so in the future. *Non-discrimination, properly understood, is not a positive state of affairs.* Because it must “discriminate,” business cannot defend itself within the parameters of Internet Policy Statement upon which the NOI is based; parameters that regards discrimination as negative, and “openness” as the cardinal virtue. The Policy Statement principles are themselves philosophically flawed and harmful, miscasting the pre-requisites of broadband infrastructure wealth creation (property rights, exclusive deals and contracts and so forth) as antithetical to consumer welfare.

## Elements of a Constructive Notice of Inquiry at Today's Advanced Stage of Communications History

One Republican commissioner is pleased the commission is “willing to engage” and to “discover exactly how the marketplace is functioning.” This commissioner notes the agency exhibits “humility to recognize the gravity of our actions.”

One will scour the NOI and the commissioner announcements in vain for actual humility, for any recognition that government failure is both endemic and harder to extricate from than mere bad business decisions against which consumers, competitors and Wall Street can array themselves.

Historically speaking, capitalism itself is a new phenomenon, and communications networks are massive-scale private assets and infrastructure. The true challenge now is to extend the realm of property rights into an extraordinarily difficult field. Such institutions have to be discovered; they're not necessarily obvious. FCC's job now is not to look for ways to *undermine* property by favoring either side in this battle, but to do the same thing previous generations did in fostering the establishment of institutions of private property and liberty into ever more sophisticated and difficult realms like network property and spectrum. To simply retreat to “openness” on the legacy networks would represent a colossal shirking.

Fundamentally this is not a proceeding undertaken to legitimize markets. The questions put network owners on the defensive without a corresponding recognition that the behaviors at issue—special agreements, contracts—are essential for consumer welfare. Demands for “openness” are rarely offset by legitimizing voluntary, contractual transactions that may appropriately entail “discrimination.”

That lack of assertiveness is all the more unfortunate when considering that, often, the problem consumers face is not that no competition exists, but that it remains illegal or cumbersome thanks to franchise, zoning, and environmental barriers, or compartmentalization of network industries (electricity, water, rail, sewer, communications) into regulatory silos—*all of which are the products of prior regulatory decisions* and regulators thinking within their own squares, precisely as they are doing today with the concept of neutrality. The NOI suffers the same shortcomings by seeking justification for *business* behavior but ignoring the multitude of *government* barriers to massive liberalization and the unshackling of infrastructure wealth.



Rather than repeating the platitudes of the Policy Statement, The Notice of Inquiry should have been an entirely different document in which commissioners authoritatively laid out a serious statement of principles asserting the prerequisites for the creation of Internet and communications wealth, and addressed the impediments created by political institutions. All inquiry should center upon FCC's capability to foster actual liberalization rather than implicitly seek validation in drawing up a Reason for Being for the next 100 years. Numerous questions are posed in the NOI, directed at private sector behavior; but the analogue to each of these questions is more properly directed at FCC. Indeed, answers to the questions in the NOI are useless without the context provided by what FCC regards itself capable of improving upon rather than damaging.

**The following questions require answers before FCC can properly act upon NOI input.**

- What is FCC doing to fairly define “discrimination” and to reject the knee-jerk negative connotation before asking firms to subject themselves to public criticism?
- In what ways does FCC acknowledge “discrimination’s” essential function in infrastructure and bandwidth creation, consumer welfare, child safety, network security and other desirable features of content and service?
- In what ways does FCC recognize “neutrality” or “openness” as a mere feature of one of many types of networks that potentially can co-exist, rather than the defining characteristic of a system (“the public Internet”) it presumes to regulate?
- What intellectual case is the FCC preparing to combat infrastructure socialism and to avoid lending credence to a federally managed communications industry highly susceptible to rent-seeking behavior?
- What is FCC’s assessment of imposed openness on homeland security, information security, privacy, and the vulnerability of intellectual property to piracy?
- In what sense does FCC recognize the relevant competitive unit is not merely the transfer of information from point A to point B, but the creation of networks as such?
- Does FCC recognize that proprietary networks are consistent with consumer access? If not, why?
- What is the FCC perspective on the relevance of and myriad competitive pressures created by operations (like PacketExchange among others) that remove traffic from the public Internet altogether, shunt it along and re-join near the end user? In what way does FCC believe it would improve upon those pressures as they increase?
- What conditions does FCC regard as pre-requisites for firms to undertake major infrastructure investments? How are neutrality policies consistent with them?

- No NOI is necessary to know it's expensive to build networks and that access must be governed by the creator. What is FCC doing to assure that regulatory silos are torn down and cross industry partnerships are fostered (power, water, rail, sewer) to secure more advanced communications?
- How has the history of government "silo" regulation contributed to the scarcity of "pipes" to the home, and how will FCC avoid future problems?
- Given the emphasis on regulation rather than markets for redundancy, duplication and cross-industry rights-of-way and franchise reform, how would FCC impose net neutrality mandates without also embracing price and entry controls? Would such a campaign entrench the agency and increase its budget?
- What does the FCC regard as the impact of net neutrality mandates on First Amendment protections, and would such mandates survive a challenge?<sup>3</sup>
- Bureaucracies tend not to wither away but to devise campaigns to expand turf. Which of its policies does FCC regard as destructive? What would induce FCC to say it's causing harm and that it and other regulators should step aside?
- Short of future versions of the past three decades' wrenching telecommunications reform attempts, what more streamlined exit strategy does FCC envision when net neutrality mandates need similar rollback? (Upon emergence of broadband over power lines, for example)
- What has FCC determined to be the function of user ownership (real estate developers, content companies, etc.) of portions of communications infrastructures in offsetting market power of providers, and how do these impact calls for neutrality?
- Does FCC realize neutrality policies broadly applied could rule out such solutions as user ownership of networks?
- What is the agency doing to help halt antitrust investigations into the alternative networks like the proposed XM-Sirius merger, in order to foster massive-scale competitors to the landline "broadband behemoths" it now laments
- What is FCC's strategy to relinquish powers to other general regulatory agencies and avoid damaging duplicative and industry-specific regulation?

The NOI would have also benefited from less combative tone from commissioners regarding U.S. broadband access compared to other nations; raising the issue in the context of this NOI with little room to assess so complex an issue presumes neutrality provides an answer. In reality, FCC itself obviously had some role in today's telecommunications structure.

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<sup>3</sup>Randolph May argues against the survival of such a challenge. "Net Neutrality Mandates: Neutering the First Amendment in the Digital Age," *IS: A Journal of Law and Policy*, Vol. 3:1, May 2007. [http://www.freestatefoundation.org/images/IS\\_Journal\\_Net\\_Neutrality.pdf](http://www.freestatefoundation.org/images/IS_Journal_Net_Neutrality.pdf)

Comparative analysis might show other countries might have benefited from not having suffered the legacy of a powerful regulatory agency governing a massive, continent-wide, wireline infrastructure. Moreover, another nation's temporarily more rapid communications system is no advantage and hardly worth comparison if censorship and lack of freedom of speech is rampant. Few would trade the freedoms of speech that our "behemoth" systems allow. Indeed, realities of corporations responding to consumer demand—Howard Stern, on-demand porn—hardly exemplify a corporate sector bent on restricting access

### **Addressing Key Elements of the NOI and the Statement**

The NOI asks "...whether network platform providers and others favor or disfavor particular content...." As noted herein, favoring particular content is consistent with voluntarism, the buildup of new social and communications institutions within society, and is a pre-requisite for the wealth creation needed to "ultimately benefit consumers." Liberty in the institutions developed for the creation and dissemination of information, rather than governmental guidance of such modes of expression, is one of our most cherished freedoms. If regulatory authoritarianism succeeds in over-ruling voluntarism, it undermines those liberties.

The "discriminatory" practices about which suspicion reigns are the stones and mortar of a functioning communications network but here can constitute guilt, each being individually open to subjective condemnation, with no context as part of a dynamic whole. Natural network evolution entails not only restrictions on access, but making networks longer, fatter, and redundant. Companies don't get to decide in isolation, but must respond to investors, advertisers, consumers, and the constant pressure of rivals. All these array against unreasonable blockage of any content or information flow. "Balkanization" or discrimination, even if they happen, increase options by the responses they impel. Imagine a spectrum with "neutrality" or perfect competition at 1, and monopoly or a proprietary at 100: Economists have beaten to death the endpoints, but have little appreciation for the abundance of activity taking place at 2 through 99.

The Statement of Principles emphasizes the *open and interconnected* public Internet and upholds individuals' ability to *access the lawful content of their choice ...and...connect their choice of legal devices*. While he wants companies to have incentives, one Republican commissioner concurs with this framing of the issue, saying "it is equally as important that consumers have the freedom to pull or post the content of their choice anytime, anywhere and on any device." Statements like this have the unintended effect of improperly conflating political freedoms and contractual/economic freedoms, while

potentially undermining both. Rights, of course, describe the relation of an individual to the state, not to a commercial vendor. Be that as it may, commerce is not a threat to democracy or the free flow of ideas; it is the enabler.

Consumer choice is created by, not threatened by, the existence of the producer. That consumer choice is made available by the interface between content providers and network owners. It's often governments that impede consumers' access to content (note the use of the words "*lawful* content" and "*legal* devices" in the Statement) via censorship, filtering, prohibition of access to porn, gambling, etc. Or, governments, as in the a la carte debate, interfere with structuring of content packages that firms would otherwise offer. As far as the attachment of devices, prior inability to attach them is rooted in a regime where monopoly was entrenched by government now calling for the right to connect a device. Disallowing enhancing networks via the addition of peripherals is not a feature of the marketplace. Somebody always needs to control a network to protect it from damage, and it's normally a mere contractual matter; What the NOI does is smuggle in the idea that government should be the entity to make that assurance.

An alleged "principle" like this is itself flawed and serves agency self-interest. Aside from conceding the opponents' principle of net neutrality, and subverting producer rights, and granting their false argument that such mandates benefit anyone, again we have the false dichotomy between corporate profits and consumer welfare when in fact the second depends upon the first; but more importantly political freedom isn't the relevant concept when it comes to a consumers relationship to any company with which it does business; those are contractual matters with which governments that intervene or more likely to undermine than enhance.

The Statement also now seems to realize that "...consumers are entitled to competition among network providers...." If only regulators had believed this a century ago when competition did exist and federal and state regulators stamped it out. In any event, it's a misleading use of language for regulators to say consumers are "entitled" to competition when regulators actually intend to stamp out competition via neutrality. It's also an improper use of language in that what consumers are actually entitled to is for government policies to not forbid their access to information. "Entitlements" are not the language of competition. In a sense, this statement almost unselfconsciously embodies the essence of all that's wrong with infrastructure socialism, and the regime destructive of consumer welfare it heralds. Again, with respect to networks, we're at the infancy of development of property rights. It's crucial that agencies (not just FCC) focus on tearing down the walls they've erected between our network industries, itself more than full time job, and not build

new ones in frontier applications like wireless while they ignore the real reasons consumers lack access and choice.

Even though “no commenter had alleged that the entities engage in packet discrimination or degradation” nonetheless “their commitments were incorporated as conditions of their mergers.” If you were suddenly to transport all today’s traffic back 10 years, there’d be discrimination because it couldn’t all fit. Content, technology, and network infrastructure grow hand in hand, and at various times one sector may have sway over the other. Competing rivalries reveal profit opportunities, and in a never-ending stir create competitive pressures; those pressures dampen or work around “discrimination,” to bring service tomorrow to anyone who doesn’t have it today. The background hum, the capability, of yesterday’s Internet was far less that of today. Today’s Internet stands in a similar position with respect to that of the future. Again, content and infrastructure are not natural enemies; they are being driven into that unnatural state of affairs by an FCC that offers the prospect of picking sides and hews a flawed philosophy of how network wealth is created. The gains from trade from the two sectors working together could hardly be plainer; indeed, the increasing wealth of content and communications companies make it likely that they too will participate in network infrastructure expansions, to the point that it lines increasingly blur between content and delivery enterprises.

The Agency’s queries with respect to validating legal authority to regulate in support of the Policy Statement to address “market failures,” seem, especially in the context of this particular debate, like going back to ancient scriptures tainted by rent-seeking. Application today is more than highly suspect. The states of consumer well being allegedly safeguarded by a grant of jurisdiction can be fulfilled by competition more readily than by political discipline. As the above sections noted, emphasis must be on liberalization and allowing the emergence of institutions that replace the political and bureaucratic oversight of “long and thin” property, instead of seeking validation of new FCC authority.

The NOI section on packet management and prioritization is problematic; it’s an invitation for the communications industry at large to open its veins when it asks broadly, are “providers operating consistent with the Policy Statement?” As noted, well functioning markets serving consumers cannot be consistent with the flawed philosophical principles of the Policy Statement. Do providers treat packets in different ways? Do they prioritize? Naturally. “Discrimination” means decisionmaking and choices, both of which are carried out at every level by all sides in the debate, not just providers.

The pricing section of the NOI entices commentators to weigh in on the practices of content providers, not just access providers. FCC asks questions such as should “our policies distinguish” between content providers and access providers that charge end users and those that don’t. FCC seems to be asking whether or not it should *discriminate*. Note the implication that policies to discriminate are helpful if done by FCC, but not when carried out by voluntary markets.

Nothing important can be known today about how pricing of content on the networks of tomorrow is going to be implemented, and nothing to be gained and a lot to lose by prescribing it now, or prescribing conditions on how producers make their decisions. Whatever current practices may be with regard to charging end users, none are fixed in stone by any player involved; FCC has no omniscience to improve upon the unknown. Future balances of power and pricing structures are unknowable to us today; but regulation could easily lock procedures in place that would be inferior to practices that otherwise emerge. Rollback of any such policy would be difficult.

The NOI asks “Does behavior vary depending on the number of broadband Internet access service providers ...in a geographic area?” Unless wedded to orthodox infrastructure socialism, one would hope so, even demand it, since such variations indicate a profit opportunity. That signaling helps direct where content provider and rival infrastructure owner investments go, creating wealth. In the electric power debate, there was something called a “stranded cost” that utilities invoked when they were bypassed by a rival. The ultimate stranded cost occurs when consumers, Wall Street and investors, takeover artists and rivals abandon one’s network for an alternative. Market incentives can foster openness to avoid that situation.

Most of the allegedly problematic behaviors indicated in the NOI actually signify healthy economic activity, whether carried out by access providers or content providers. The NOI instead seeks justification of myriad discrete behaviors with the implication that they’re harmful; or if a particular behavior is acceptable, the next one in which the firm engages may cross the line. This is not a helpful stance. The NOI next “ask[s] whether the Policy Statement should be amended.” Indeed it should, with a bias toward regulatory restraint and a more mature recognition of the urgency of the creation of network wealth.

FCC concludes by asking “whether we should incorporate a new principle of non-discrimination” and, if not now, “what market characteristics would justify the adoption of rules?” It’s been noted that FCC’s choosing a net neutrality policy is *inherently* discriminatory, so the question is incoherent. The casual “what would justify the adoption of rules” is alarming given the

numerous noted weaknesses of FCC in dealing with any such problems, and the rent-seeking that would be unleashed by the attempt.

### **An Aside on Commissioners' Statements**

Commissioners tend to lend credence to the market failure philosophy without pondering equally the relative risks of government failure or hubris. One gets the impression that at the first sign of what it deems trouble, in comes the FCC. Chairman Martin himself promises, "The Commission is ready, willing and able to step in if necessary."

In being ready and willing, Martin says the commission has "the dual responsibilities of creating an environment that promotes infrastructure investment and broadband deployment and to ensure that consumers' access to content on the Internet is protected." But there's no contradiction or "balance" to be struck between these two; the second requires the first. We don't even need to rely upon the benevolence of infrastructure companies to expect self-interest and rivalry will serve us better than an Internet Policy Statement.

Mr. Copps laments that "we are nowhere near seeing the kind of ubiquitous third or fourth player necessary for competition." There is no need for numerous rivals in competitive capital markets to maximize consumer welfare; but if there were, what is it that would impel a competitor to emerge? Excess profits in the status quo. With FCC's approach of mandating access to whatever network technologies emerge, such a competitor is even less likely to emerge. So the end result of neutrality is a regulated grid; good for regulators, bad for the consumers regulators hope to speak for.

We actually live in a world where those same providers being disparaged ("these duopoly operators control some 96 percent of the residential broadband market) facilitated a form of high-speed access that didn't exist a short time ago. Discounting FCC's own role in having tightly controlled U.S. telecommunications for decades, and its instrumentality in the industry's being monopolized in the first place, does not seem fair.

Copps wants to intervene rather than "step back and rely on the genius of that marketplace" Leaving aside that "stepping back" is far from doing nothing, what—truly—is the alternative to relying upon "genius" of men and women acting in a voluntary economy? To ask is to answer, and to ponder the impulse for agency intervention. Copps continues: "I haven't taught history for many years, but...know that if someone has both the technical capability and the commercial incentive to control something, it's going to get tried." Given the existence of this proceeding, the desire of some

commissioners for an NPRM and not an NOI, the statement is far more applicable to the FCC itself.

“Bumpy travels in steerage” was brought up; it’s become tiresome to address this point, but those bumpy travels are what we experience now; the Internet is nowhere near capable of the vast amounts of bandwidth that future generations will need. When Copps claims “At issue is whether a few broadband behemoths will be ceded gatekeeper control over the public’s access to the full bounty of the Internet. We have a choice to make.” Note the perhaps ironic use of the word “ceded”; What’s being implied is that *government* should be “ceded” that very control over communications wealth creation.

Commissioners invoke the sanctity of “dumb pipes,” but we could more properly add a competitive dimension that acknowledges the possibility of the “genius” of pipes. To hold in 2007 that pipes should henceforth be dumb further illustrates hazards of government regulation; Why would the agency in charge of communications cripple it, and why would it regard smart pipes as incompatible with retaining dumb ones as consumers desire?

Governments often presume to pick winning technologies, the “racehorses,” so to speak, when instead any governmental focus should be on improving the “track” (the tax, legal and regulatory environment) on which *all* the horses run. Such a stance would also counsel keeping out of decisions about whether networks have to remain stupid. Smart networks in no way imply “seeking permission from the owner of the broadband pipe” anymore than it does now.

The commissioner says “It is time for us to go beyond the original four principles and commit industry and the FCC unequivocally to a specific principle of enforceable non-discrimination, one that *allows* for *reasonable* network management but makes it clear that broadband network providers *will not be allowed to shackle* the promise of the Internet in its adolescence” (emphasis added). Note the use of language: “allow,” “reasonable”: these are terms that mean government should get to decide or do the “shackling.” In reality, the “industry” deserves more credit, having been instrumental in bringing about not only the early “promise” of the Internet, but the present reality.

Commissioner Adelstein similarly wants to act while “decisions are being made today about the architecture of the Internet.” This is a curious position: Decisions *are* being made today; but there should *never be a time when decisions aren’t being made* about Internet technology, and the deployment of that technology. Architecture decisions about proprietary networks, open ones, partially shared ones, overlapping and redundant ones—there is no



time one can reasonably anticipate that architecture should not be in flux. It is not a positive development for an agency to freeze architecture via neutrality.

Adelsteins says “Consumers don’t want the Internet to become another version of TV, controlled by corporate giants.” Notice no recognition of the mounting alternatives to traditional TV online, and again no reservation about government being “giant” enough to set terms for everyone, and no mention of FCC’s hand in the “Big Three” era or in delays of the rollout of competition, or delays today in the rollout of new spectrum. Only “corporate giants” are a problem to the agency mindset. But for consumer welfare, we need more corporate giants and a bit less of an agency leviathan more powerful than them all put together.

One Republican commissioner notes “our nation’s discussion regarding net neutrality has been a vigorous and healthy one.” What would have been healthier—and it’s still not too late—is using this unique opportunity in business and political history to build an intellectual and consumer case against infrastructure socialism. It is indisputably unhealthy when private property is on the defensive, ashamed and unable to articulate how essential it is—even when it “discriminates”—and how catastrophic it is if an idea like infrastructure socialism prevails.

### **Network Security: the Elephant in the Room**

There’s little in the NOI about the realities of the need for elements of proprietary control over networks to combat security threats and assure reliability. For that we need, not neutrality, but a plethora of overlapping wired and wireless communications networks. Apart from the result being a better, cheaper and more robust version of the openness that today’s advocates of net neutrality seek, security would be more ingrained.

Lessons from what critics disparage as “access tiering” will allow us to better deal with spam, cyber-security, privacy, and piracy—all of which stem from inadequate ability to authenticate users and price online network usage.

Network neutrality would undermine these lessons. But, in this age of potential “cyberterror,” if imposed neutrality leads to vulnerability or even victimization, what recourse would anyone have? To protect a network sometimes not merely discrimination but outright exclusion is vital. FCC’s pondering whether network discrimination benefits anybody or not is irrelevant if a network is destroyed. Again, when it comes to security, as with consumer welfare, the choices are the same: neutrality or bandwidth. Which

approach adds flexibility and protects networks' future, what damages them? Those are important considerations.

## Conclusion

If no FCC existed, one would be hard pressed to seriously propose creating the kind of entity that exists now. As it stands, the agency clings to past relevance (perhaps glory, in some eyes), operating in a priestly world where the agency wonders "will our policies create incentives?" But in a world in which firms discover their own incentives to invest, such as Google's \$1.65 billion purchase of YouTube, Verizon's commitment to spend \$23 billion on fiber to the home, and AT&T's proposal to spend over \$4 billion on IPTV, the imperative would seem to be to remove regulatory uncertainty, to eliminate the possibility of whim. In this context, the task of reformers—which may have to come from outside the FCC—should be to de-legitimize the regulatory approach to infrastructure.

A proper competitive infrastructure marketplace grants no entitlements, and does not entrench corporate welfare on anyone's behalf. For the interventionism of net neutrality to prevail is actually the nightmare scenario—*for either side of the current dispute*.

Friends of openness, freedom of speech, low prices, and all the other "good stuff" the Internet promises, will benefit from letting the parties duke it out, the end result of which will be a "background hum" that promises to dwarf the capabilities of the Internet of today. Commissioners need not pick sides in a battle of giants.

We want tomorrow's Internet at the speed of light, not at the speed of government. Commissioner Tate's statement comes closer than any in asserting the proper stance of government toward the unfolding communications industry, "I am skeptical of the present need to impose new rules, *or even principles*," (emphasis added). This sentiment deserves to have been the starting point of analysis. Ultimately, the agency itself will have to get involved in scaling back its role in communications. Alfred Kahn at the CAB came to realize the world was much better off with his agency much weakened, and proclaimed in *Time* magazine, "I will consider myself a success in this job if there is no job when I leave it." Empire building is a common, even inevitable at government agencies under siege by reality and the disappearance of a mission, and can only be stopped if people point it out.

New proceedings are needed in which FCC takes the opportunity to define a more limited role for itself, one that replaces agency discipline by unleashing competitive discipline, and that adheres to government's basic function of respecting property rights and contract and by extension, wealth creation.

Net neutrality enshrines the opposite principle, enabling one side of the debate chooses disposal over the others' property, entrenching political control and decades of rent seeking.

Network liberalization should be the emphasis of combatants in today's dispute. Otherwise, the paradoxical result will be that regulators and activists seek "neutrality" on what, in reality, is sub-par infrastructure relative to our needs. For that reason, the response to the threat of net neutrality is a matter of CEO-level corporate guidance, not everyday government affairs conducted by lieutenants in the field. As corporate net neutrality advocates may learn too late, there's nothing special about the owners of broadband pipes that inoculates the proponents of net neutrality in tomorrow's communications fights. Everyone in the communications industry becomes more vulnerable to political predation in a world of government-enforced net neutrality.

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